Supreme Court of the United States.

October Term, 1902.

No. 225.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER.

BRIEF BY PLAINTIFFS IN ERROR.

[Figures in parentheses refer to folios in the printed record.]

Writ of Error from final Judgment of the Supreme Court of Minnesota. This judgment affirmed a foreclosure Judgment of the trial court upon the sole ground that plaintiffs in error were in all matters therein concluded by a former judgment on appeal in the State Supreme Court in the same cause. The other possible ground appearing in the opinion is of no import here, since for many years before and since this decision was made it has been the settled law of the State of Minnesota that both the Supreme and trial courts are as much bound by a decision upon an earlier appeal in a cause as are the parties,

and that neither court upon a later appeal has *Jurisdiction* to reverse or modify a point so decided.

Bradley vs. Norris 67 Minn. 48
Tilleny vs. Wolverton 54 Minn. 75

The ground of this writ of error is that by such judgment plaintiffs in error are deprived of their property without due process of law in that they were not allowed to be heard upon any defense to the demand recovered upon, denied all opportunity to be heard in the cause, and of their "day in court."

Plaintiffs in error, being the owners and in possession of a highly improved farm of about 800 acres located near the City of Owatonna, Minnesota, the several tracts of which were covered by separate mortgages some of which were held by respondent, in February, 1895, plaintiffs in error entered into an agreement "Exhibit 'E" with respondent, and as a part of such agreement, also executed and delivered to him a deed of warranty conveying the entire premises (9 to 11 and 22, 23). The brief terms of this contract are that respondent should buy in all the old or formal mortgages, that the total sum due him therefor was to be $20,400.00, for which plaintiffs were to pay him $100.00 per month continuously, (to be lessened in proportion to any payments upon the principal), and whenever, these monthly payments being kept up, they should have paid him the $20,400, then a deed executed by respondent to plaintiffs in error for the premises, and deposited in

escrow as a part of the original transaction, (10 and 24-25) was to be delivered to said grantees.

Default having been made in keeping up the monthly payments, respondent first sued in ejectment pleading this contract and deed to him as the basis of his title and right to possession, (15 to 17 and 115 to 122). Being defeated here the present action was brought, the complaint being indefinite as to the cause of action intended to be relied upon. By reason of higher rates of interest, attorneys fees, etc., contained in the formal mortgages the amount then due by their terms then exceeded by two or three thousand dollars that due by the equitable mortgage (contract and deed.) Respondent's possible causes of action were, (1) to forclose the formal mortgages; (2) to foreclose the equitable mortgage. He could not do both since they are inconsistent. At the opening of court plaintiffs in error made in open court an offer to allow respondent to take judgment of foreclosure of the equitable mortgage for the entire amount unpaid thereon, viz., $20,400. and all monthly payments unpaid, which offer was unqualifiedly and unreservedly refused by respondent (fo. 17, page 10.) Over objection and exception respondent then introduced evidence of the formal mortgages, the amount due on each and also showed default in paying the $20,400. provided by the contract, respondent's demand for the payment of that sum or in lieu thereof possession of all the lands and also that respondent had declared to plaintiffs in error that upon their default in maintaining the

monthly payments, all their rights in the contract had ceased—that the contract was forfeited (18 and 20.)

These proceedings set out in full in the record (17 to 20) contain all the evidence and proceedings had at the trial. See trial judge's certificate, (33) also that to this court (211-212). This certificate (33) is persuant to express provisions of the statutes of the State of Minnesota relative to making, settling and certifying settled cases and formally incorporating the same into the record.

> "The party preparing a bill of exceptions or case "shall * * * * present the same to the judge or "referee who tried the cause, for allowance or set- "tlement and signature, upon a notice of five "days. * * * * The case or bill, being examined "and found or made conformable to the truth, "shall be allowed and signed by the judge, referee "or other officer acting instead of such judge or "referee, as provided herein."

Gen. Stat. Minn., 1894, §5400.

Upon this showing the trial court entered judgment ordering the foreclosure of all the formal mortgages, for the several amounts, attorney's fees, etc., found due on each—but wholly silent as to the equitable mortgage. To the fact that during this "trial" no opportunity was offered to present or litigate any defense to a demand of foreclosure of the equitable mortgage attention will be further directed later

—enough here to say that by respondent's acts that subject matter was in no manner before the court for any purpose, his then action not only resting upon wholly different facts, and proceeding along lines entirely hostile to any such action, but himself at that period in this litigation expressly refusing the then offered entire relief possible upon the repudiated cause of action, and denying the existence of any power to foreclose the equitable mortgage, even of the then existence or validity of any such mortgage. From that judgment plaintiffs in error appealed to the State Supreme Court, raising in that appeal but two matters for consideration, vis., (1) That all the formal mortgages foreclosed were merged in the equitable mortgage, and (2), That under the pleadings as construed in the action by respondent and the trial court, no foreclosure of that mortgage was proper *in this action*. Of these that court sustained plaintiffs in error in (1), reversing the judgment because of the contrary holding of the trial court, but ruled against them on (2), holding the complaint broad enough to warrant that relief. (104 to 110.) The opinion contains the following:—

> "The judgment appealed from is reversed and "set aside, together with all subsequent proceed- "ings in the direction of its enforcement if any "there be. Upon the remand of the cause to the "court below it will proceed to determine the "amount due upon the equitable mortgage, amend "its findings of fact to correspond, and also

"amend its findings of law in accordance with "the views herein expressed." (110.)

Prior to the remand plaintiffs in error petitioned that court for a re-hearing and modification upon these directions to the trial court, but the petition was denied, (78 to 88 and 89). In Minnesota the rule regulating petitions for re-hearing is,

"The applicant must be able to show some "manifest error of fact into which counsel or "the court have fallen in the argument or decis- "ion of the case as, for example, that a provision "of statute decisive of the case has, by mistake, "been utterly overlooked by counsel or the court; "or, perhaps that a case has been decided upon a "point not raised at all upon the argument, and "there be strong reason to believe that the court "has erred in its decision; or unless in a case "where great public interests are involved, and "the case has either not been fully argued, or "strong additional reasons may be urged to show "that the court has erred in its ruling. But "where a question of law has once been fully dis- "cussed on the argument and considered by the "court, we can not admit that a party is entitled "to a re-argument on the ground that there is "manifest error in the decision."

Derby vs. Gallup, 5 Minn. 85 (119),

Cited and reaffirmed in

Densmore vs. Shepard, 46 Minn. 60–61.

The denial here is general, no reason is assigned. Upon the remand plaintiffs, upon full showing, moved the trial court for an order allowing them to serve and file their supplementary answer setting up in defense as against any foreclosure of the equitable mortgage an election by respondent to pursue to final judgment an inconsistent remedy, which elected procedure was, under the facts at the trial, sufficient to allow the awarding of a full, complete and perfect remedy to respondent, but which relief he then refused to accept; estoppel by conduct further to prosecute the cause and setting up explicitly their claim that any further proceedings upon the equitable mortgage, especially if the offered defense were refused to be heard, would be a taking of their property without due process of law and without giving them their day in court, and void under the provisions of the 14th amendment to the Federal constitution. (92 to 98) This motion was objected to by respondent upon the sole and express ground that all matters in said answer and all defenses therein had been duly and fully determined against plaintiffs in error at the prior appeal and were then res judicata. (112 and 99) At the so-called "hearing" on the motion of respondent for amended findings and judgment foreclosing the equitable mortgage plaintiffs in error appeared and offered due and formal proofs of the former action in ejectment, its decision against respondent on the ground that

the contract and deed to him under which he claimed title constituted an equitable mortgage and that the offer of judgment of foreclosure thereof had been expressly withdrawn prior to the submission of the cause at its first trial. Respondent objected to all the above and to any evidence whatsoever upon the ground that everything save the foreclosure of the equitable mortgage was concluded by the former decision on appeal. The court sustained all these objections, (112 and 100) refused to hear plaintiffs in error save upon the sum due upon the equitable mortgage, and entered judgment foreclosing that mortgage after so refusing to hear any defense thereto. From this judgment plaintiffs in error appealed to the State Supreme Court, which as before stated, affirmed it upon the sole ground that the prior decision was the law of the case. (181 to 183]

Since I think it a fact that the merits here depend largely upon precisely what was done (or what plaintiffs in error could have done) at the first trial, attention is now requested thereto more specifically. Respondent did not then offer to prove a single fact relative to the equitable mortgage—save as here stated, but, repudiating that, sought to prove only (1) The existence and sum unpaid on the several formal mortgages (aggregating then nearly $3,000 more than was collectable by the equitable mortgage.) (2) That the contract (Exhibit "E") had become void, and was no obstacle to the foreclosure of the old mortgages, indeed, that they were the only securities. Hence his proof was of a demand,

not for any monthly installments, but for the entire sum ($20,400) secured by the contract, or in lieu thereof immediate possession of the lands, and (3) that all rights under the contract of plaintiffs in error had ceased. Also (4) that the contract was forfeited unless full payment was immediately made at the time of the demand, which was some time before bringing this action. The repeated objections of plaintiffs in error to the evidence of any of the formal mortgages as then non-existent were overruled. The assignments of error and briefs of plaintiffs in error upon the first appeal are found on pages 27 to 42 inclusive of the record. Assignment No. 5 refers, as shown later in the brief, solely to matters distinct from election of remedies and the underlying principles of res judicata here relied upon.

Plaintiffs in error made the claim under the Federal constitution, 1st, In the supplementary answer in the trial court [97-98], 2nd, In assignments 7, 8 and 9, assignments of error on their 2nd appeal [142], 3rd, In their 5th position as stated in that brief [144, page 80,] and 4th, In their main brief [fol. 153] and 5th, In the oral argument before the court. See certificate of Chief Justice, fo. 209.

It has ever been the settled law of the State of Minnesota that, save where excluded by some imperative rule, the filing by a defendant of a supplementary answer is a matter of right and not of discretion.

Malmsten vs. Berryhill, 63 Minn. 1.

The questions involved are, therefore;—

[1] Did plaintiffs in error have any adequate opportunity to present, and have properly considered by the court their defenses to any foreclosure of the equitable mortgage as such defenses existed when, or at any time after, respondent sought such foreclosure?

[2] As to plaintiffs in error, do the proceedings shown by this record show "due process of law?"

Possibly, [3) Did plaintiffs in error possess and offer to prove any defense of sufficient merit to warrant their demand for its hearing and consideration?

ASSIGNMENT OF ERRORS.

I.

It was error in the trial court to refuse leave to file the supplementary answer prayed for by plaintiffs in error, and error in the State Supreme Court to affirm the judgment entered in said cause upon said refusal by said trial court.

II.

It was error in the trial court to reject the evidence offered by plaintiffs in error to substantiate their defense in said cause, and error in said State Supreme Court to affirm the judgment based upon such refusal.

III.

It was error in said trial court to refuse the demand for a trial made therein by plaintiffs in error, and to order judgment against them upon amended findings made solely upon the evidence submitted at the former trial, when the defense asserted after the remand, did not exist and was not pleaded nor offered to be proven, and error in said State Supreme Court to affirm the judgment so entered.

IV.

It was error in said State Supreme Court to hold plaintiffs in error bound by the former judgment therein upon the first appeal, res judicata.

V.

It was error in said State Supreme Court to remand said cause upon said former appeal with directions to the trial court to amend its findings of fact, upon the evidence submitted at the former trial, and thereon to order judgment in favor of this defendant in error for the foreclosure of the equitable mortgage.

VI.

It was error in said State Supreme Court to hold these plaintiffs in error bound by such directions in said decision upon said former appeal and to refuse to allow them to be heard upon, and in refusing to consider their said defense based upon the controlling election by

defendant in error to rely solely upon his formal mortgages, and to hold the contract and deeds of no force, such election having been persisted in and relied upon until after the entry of final judgment in said State Supreme Court holding that said formal mortgages were of no force and that no liens upon the lands and premises involved existed under them.

VII

It was error to hold plaintiffs in error and the court bound by said former decision as the law of the case.

IX.

It was error in said State Supreme Court to hold that said proceedings constituted due process of law, as required by Sec. 1 of Art. XIV of the amendments to the Constitution of the United States, and error to hold therein that thereby plaintiffs in error were not deprived of their property without due process of law.

X

It was error to hold that in said proceedings these plaintiffs in error were not denied the equal protection of the laws.

XI

It was error to refuse to plaintiffs in error their right to be heard upon, and to present their

defense predicated upon the former election made in said cause by the defendant in error to claim solely under the formal mortgages, such election having been by him persisted in after the offer made to him in open court at the trial in said cause that judgment might be therein entered without contest for the foreclosure of the equitable mortgage and for the entire amount secured thereby, which offer was expressly refused by defendant in error, his said election having been persisted in until after the final judgment upon appeal holding said formal mortgages void and of no effect.

POINTS AND AUTHORITIES.

PRELIMINARY.

It is clear that, upon the complaint, respondent might, upon demand, have been compelled to elect between the different causes of action set forth therein. Whether or not plaintiffs in error did, in law, make such demand, it is patent that respondent did elect, precisely as though the demand had been made and sustained by the court. It follows that at the first trial there was no opportunity or occasion to offer or present any defense to the equitable mortgage as distinct from the formal ones, even had there then existed such as were perfect. The then renunciation of all claims by respondent save upon the old mortgages effectively removed

the equitable mortgage from the case so far at least as concerned that trial. It cannot be maintained, in opposition to the above, that all respondent really did was to present the entire subject matter to the court, leaving wholly to it to determine what cause of action he had and what remedy he was entitled to. (1) He did not offer to prove a cause of action upon the equitable mortgage. (2) The claims he did assert negatived the then existence of any equitable mortgage. (3) His refusal to accept full relief upon that cause of action was absolute and unconditional. (4] He plainly elected to stand solely upon the old mortgages with the extra $3,000 recoverable thereon. Also, succeeding in his demand upon the old mortgages below and so driving plaintiffs in error to appeal, it is equally plain that throughout the entire cause up to the adverse decision upon the appeal, respondent stood upon his original demand and causes of action only. After such election and renunciation and while necessarily standing upon both, he could not, even if he attempted to, change his position.

It follows that, if not in law amounting to a demand that respondent elect between his inconsistent causes of action, all that plaintiffs in error said and did relating to the equitable mortgage and any cause of action based upon it, was wholly voluntary, and in no manner called for at, or pertinent in that trial. In order to save expenses, or because they were at that time willing to forego all defense to the equitable mortgage, it was competent for them to

make the unqualified offer of full judgment thereon. But they were in no way bound to hold that offer open and this record shows that they did in fact withdraw it before the first remand on appeal, and before respondent had acted regarding it further than to unconditionally reject it. By what principle then, could they be prevented at any time thereafter, from asserting as against any demand for foreclosure of this repudiated mortgage any defense they might have? It is a certainty that no opportunity to present any defense to the equitable mortgage existed prior to the remand upon the first appeal.

Separately of Our Assignments.

No. 5.

Error in the direction by the Supreme Court to the trial court, at the first appeal.

No reason in justification of that direction is found in the opinion [other than as to the question of pleading and practice then decided, and not touching any point here made] save only this: The Justice writing the opinion said in it, [110] "No good reason "existed at the termination of the trial, *and none now* "*exists* why plaintiff should not be entitled to a fore- "closure in this action of his equitable mortgage." If this be confined to the objection of pleading just passed upon, it is good. But it as later construed by the trial and Supreme Courts, as a direct holding that when that opinion was written no defense existed to such foreclosure, then it is wholly unwar-

ranted, and a plain denial to plaintiffs in error of any "day in court." It so constitutes not only a want of, but a plain denial of, due process of law.

It is however said that plaintiffs in error had presented and litigated all their defenses to the foreclosure of the equitable mortgage later sought to be interposed. That this is a total misapprehension of their then and now positions most clearly appears. Their defense in the trial court was then thus stated by them. (37) "That plaintiff, having elected at the opening of this trial not to accept a decree herein for the foreclosure of said equitable mortgage, is not entitled to any relief herein." In the supreme Court, assignment 5, (49) "The court erred in not ordering judgment of dismissal." Appellants' position, No. 8, (54) "Respondent having sued on those mortgages only, and having expressly refused to take a decree for the relief he was entitled to on the facts, but not by his pleading cannot now, on appeal, shift his position and claim to be entitled in this action to a decree for the foreclosure of the equitable mortgage." It is to be noted at the outset that this objection was the same in both courts, and goes no further than the point that respondent could not, *in this action* obtain judgment of foreclosure of the equitable mortgage. In his then brief in the Supreme Court, commencing at fo. 62, in presenting this objection, he expressly so states it, viz., Respondent is not entitled, in this action to a foreclosure of the equitable mortgage. ~~He elected to bring action only for foreclosure of the eq-~~

~~uitable mortgage~~. He elected to bring action only for foreclosure of the old mortgages, and tried the case below solely upon that theory and claim. Now, on appeal, he cannot be permitted to shift his ground, and demand other relief. He also on the trial below expressly declined to accept such relief then offered him though his complaint did not entitle him to claim it." And in his reply brief (66), "Respondent's demand, that in case the judgment appealed from be not sustained, they be allowed to demand in this action, a foreclosure of the equitable mortgage, involves an attempted total change of base on his part and is inadmissible." Immediately following this [67 to 69] the reasons for this position are stated, being in short, [1] That the theory of the case as made by himself at the trial was contrary to that essential to such foreclosure. [2] That such theory was fully carried into the findings and judgment of the trial court. And [3], that such a shift of position in pleading would have been a departure. It may not be immaterial here to note that this entire position and objection on the part of plaintiffs in error was and was stated to be only as subsidiary to their main position, viz., that the old mortgages were all merged in the new, which alone then possessed any vitality; also that the manner of their brief presentment in court is consistent only with such understanding of them on the part of both counsel and the court. This matter then presented did not constitute, and was not presented as embodying, any defense to a foreclosure of that mortgage, but only that such relief ought not to be

granted in that action. No election of remedies is here set forth or claimed, and no estoppel extending beyond the then action.

Noting now the defense offered and sought to be litigated after the remand and set forth in the supplementary answer and the evidence offered. This defense, if valid at all, was full and complete, not only as affecting the present action but in any action and at all times. It may in brief be thus stated: Respondent, knowing all the facts, elected at the outset to bring and prosecute his action upon the formal mortgages only, therein denying the existence of any cause of action in him based upon the equitable mortgage. While in fact he technically possessed no such cause of action, yet by means of the offer of full judgment for all the relief he was entitled to upon the equitable mortgage, made in open court by plaintiffs in error, and remaining open until the final submission of the cause [114] respondent's action was made and so continued issuable in complete relief to him; the only reason for his not therein recovering judgment for everything he was entitled to, being his express refusal to accept such relief and judgment, *a refusal persisted in by him until after final judgment* against him in the court of last resort. This case falls within the second class of cases of election of remedies, viz., where the election is not final nor binding when the action is brought but becomes such when persisted in to final judgment. [See authorities cited in appellants' brief below, record herein, fos. 167 to 171, and infra.] Furthermore the case is fully within and covered by the principles

underlying the doctrine of res judicata, in that where, with knowledge of the facts, such a course is so elected and persisted in to final judgment, the party meantime refusing the offered full and complete redress made by his opponent and pressing his cause of action, which is not only inconsistent with, but necessarily destructive of, the cause of action discarded by him, thereby putting his adversary to the needless expense of an entire trial below and upon appeal, he is thereby estopped from requiring his adversary to re-litigate the entire matter upon such discarded and repudiated theory.

Warner vs. Godfrey, 186 U. S. 365.
No. 191 October term, 1902.

At the time of the decision against him in the Supreme Court upon the first appeal, respondent had his full day in court, had also had his locus penitentiae extending from the trial below until that time. By the rule asserted by plaintiffs in error his election became final and conclusive at the time of this final decision on appeal, and not before.

The record shows conclusively that the above was the precise status of the case, so understood by all parties in the trial court at the time when the supplementary answer was offered. [91 et Seq.] The trial court certifies "After the decision of the Supreme Court on the appeal heretofore taken in this action and after the mandate remitting it to this court had been duly filed therein, the following proceedings were had in this court: Notice and mo-

tion for leave to serve and file a supplementary answer." This notice and motion immediately following [92 et seq.] contains the following "Said motion is based upon the following grounds, viz., The defense therein set forth is one originating since the former trial of this cause in this court and dates in its fullness only from the entry of judgment in said cause on appeal in the Supreme Court of Minnesota. * * * [93] Said motion is based upon the pleadings and all the files in said cause and upon the judgment of the Supreme Court on appeal herein and upon the affidavit hereto attached, etc." The judgment on appeal became thereby part and portion of the supplemental answer and all and every allegation requisite or proper for the formal presentment of the defense relied upon and just stated appears. The allegations contain in No. 3 of the supplemental answer taken in connection as they must be with the above facts in the case, is not a mere allegation of a conclusion of law, but, plainly referring to them as it does for its subject matter, it is a mixed allegation of law and fact always permissible by the recognized practice of the State of Minnesota.

Curtis vs. Livingston, 36 Minn. 380.
Buckholts vs Grant, 15 Minn. 329 [406)
Webb vs. Bidwell, 15 Minn. 394 [479]

See Swafford vs. Templeton, 185 U. S. 487, where the following averment in a complaint was held sufficient to give jurisdiction, viz., "Plaintiff became, and was, possessed of the right of suffrage as

an immunity or privilege of citizenship of which he could not be deprived by the enactment of Chap. 163 under the circumstances aforesaid." To this complaint a demurrer was filed and the order sustaining the demurrer on appeal held error.

It must not be overlooked that no trial was had and no evidence admitted in the trial court subsequent to the first remand. A mere perfunctory sitting whereat the findings were amended only was allowed by the trial court, wherein the court recites "On motion of the plaintiff's attorneys, and in accordance with said decision and judgment of the Supreme Court the said findings of this court herein are hereby modified and amended as follows:" The matter was precisely thus understood and so acted upon by respondent's counsel and the trial court (fo. 99.) Again, at the hearing upon respondent's motion to amend the findings and judgment (112) this defense was again offered and in each case objected to by respondent upon the ground that all matters contained therein including the defense itself were res judicata in favor of respondent, which objections were upon that ground sustained by the trial court. Also in the Supreme Court in their brief plaintiffs in error explicitly made this defense. See assignments of error 5 and 6, fo. 142, the latter of which reads as follows, "Erred in not holding that plaintiff had elected to pursue an inconsistent remedy and had precluded himself from foreclosing the equitable mortgage." In their main brief on the second appeal, paragraph 2 (148 to 151) and again in their reply brief (167 to 174) this matter is set forth

more fully. In fo. 167 it is said "Two classes of fact, embraced within the matter of election of remedies, give rise to two rules determining when such election becomes final and conclusive. * * * In one class a new right springs into existence upon the initial act. * * * (168) "But in the other class of cases no new right arises. The party merely moves along one of two or more alternative lines of procedure, based upon rights already existing or believed to exist. But that the differing rights and consequent remedies are inconsistent all could be followed, and no election would arise. It is only by following one that the other can be barred, and that upon principles underlying the doctrine of res judicata. Every litigant is entitled to an opportunity to be heard upon his demand or defense and to present his asserted right of action or defense for consideration and determination by the court. But he can have but one "day in court," if, having the opportunity to present and be heard upon his entire claim or defense, he chooses to present but a portion of it, he is as fully bound by the decision as he otherwise could have been. He may not split his cause of action nor present his defenses piecemeal. In either case, at any time before final judgment he may petition for leave to amend so as to present his entire claim. But if he delay until the court has finally passed upon his contention he is forever bound. The judgment is res judicata. In this case respondent might at any time before the former judgment on appeal have dropped his claim upon the formal mortgages, and have demanded and received appropriate relief upon the con-

tract." Citing and commenting upon many cases. Again (fo. 174) "He had had his full day in court and then might have recovered full relief. His failure to obtain any relief was wholly due to his own act. Since this effect is the legal outcome of his intelligent choice and determination he must be held to have intended such result.

West vs. Platt 127 Mass. 372.
28 Enc. Law 528 and note 4.

* * * Having insisted upon his chosen demand until the entry of judgment on appeal, which is a final judgment upon that matter, respondent is now bound by his election."

But a conclusive reply here to any claim that the supplemental answer did not sufficiently set up a defense distinct from the matter passed upon on the first appeal is this: It was and is the settled law of the State of Minnesota that the filing of a supplemental answer, unless the pleader be barred, is matter of right, and the court has no discretion to refuse it, and its sufficiency is thereafter to be determined in the usual manner.

Malmsten vs. Berryhill, 63 Minn. 1.

Were objection made to this supplementary answer as indefinite or not sufficiently stating the facts, or as legally stating no defense, still it would be amendable on motion, (in this State amendments of this kind are granted as a matter of course)

Cool vs. Kelly, 85 Minn. 359, but no question or objection of the kind was made or considered in the trial court. It was excluded solely upon the ground that no answer, and no defense, however valid upon its face, could be received by the trial court; that the latter was bound by the directions to amend its findings and enter the prescribed judgment and was powerless to do more or less. See above recital in findings by the trial court "In accordance with said decision and judgment of the Supreme Court the said former findings of this court herein are hereby modified and amended as follows:"

This defense did not exist at the time of the trial below or upon appeal, and could not be and was not in any manner before the trial court nor before the State Supreme Court at any time prior to its decision upon the first appeal. By no possibility therefore could this defense have been considered at the time of the judgment later held by both courts to have finally concluded plaintiffs in error upon it. But it is claimed that this identical defense was fully presented to and considered by the Supreme Court of the State by means of the petition for a modification of the opinion filed therein by plaintiffs in error. The statement of a few of the answers to this position must suffice. (1) As to this matter the State Supreme Court has appellate jurisdiction only. It does not and cannot upon appeal pass upon any matter not considered and determined by the trial court. (2) A petition for re-argument or modification is wholly confined to matters and issues appearing in the then record in the appellate court. Sug-

gestions or statements contained in the petition, of any other matters either as then existent or thereafter to exist cannot be considered by the court nor any decision as to the legal effect thereof then made. The substantive matter of this petition was that upon the entry of judgment upon the opinion in the Supreme Court (in Minnesota petitions of this kind must be filed and decided prior to the entry of judgment; Rule XVII of the Supreme Court of Minnesota reads as follows:- * * * "When a decision is filed or an order entered determining the cause, the clerk shall mail notice thereof to the attorneys of the parties, and no judgment shall be entered until the expiration of ten days thereafter." And Rule XXXVII,- "Applications for a re-hearing shall be made *ex parte*, on petition setting forth the grounds on which they are to be made, and filed within ten days after notice of the decision.") in connection with the other facts therein stated an election of remedies became perfect and operative against respondent. (3) At most the petition called in question the correctness of the opinion and direction of the court. This is not sufficient ground upon which to ask a modification or for a rehearing.

"But where a question of law has once been "fully discussed on the argument and considered "by the court, we cannot admit that a party is "entitled to a re-argument on the ground that "there is manifest error in the opinion."

Derby vs. Gallup, 5 Minn, 85 (119).
Desmore vs. Shepard, 46 Minn. 60-61.

(4) The denial of the petition is general. Had the court then understood that it was denying petitioners in error an opportunity to present, and to the trial court power to consider and decide upon a defense not possible theretofore to have been presented or considered it then necessarily violated their plainest fundemental rights as litigants and sought thereby to nullify as to that case the provisions of the 14th amendment. This presumption cannot be entertained. It must therefore be presumed that the denial rests solely upon some of the above legitimate grounds. (5) Plainly the Supreme Court so understood and intended. The direction in the opinion and the reason for it are plainly stated and in neither case are broad enough to possibly include any decision upon the new matter which might or might not be thereafter offered in defense. [6] An important part of the defense later offered was not shown in any manner by the records and facts then before the Supreme Court, nor was it set forth in the petition for a rehearing. This is that portion of the records and proceedings in the prior ejectment suit, showing clearly that respondent then sought a foreclosure of the equitable mortgage in case his ejectment suit failed. Also that suit was decided against him on the sole ground that the contract and deed therein pleaded were in law an equitable mortgage. That his action and determination to press his claim for foreclosure of the old mortgages necessarily and intentionlly prevented plaintiffs in error from paying his just claim by so involving the lands and their title in litigation as to prevent them from making any

sales of said land and thereby obtaining the necessary means of payment.

Assignments, (1), (2) and (3). Error in the trial court not to receive the supplemental answer and proffered evidence, and to deny a hearing to plaintiffs in error.

Had plaintiffs in error, intermediate the remand and later perfunctory order for judgment, fully paid, or respondent released his entire demand, or had he assigned it to a third party against whom the former then held judgments or enforceable demands exceeding it in amount, or had any other unquestioned defense meantime originated, it will hardly be claimed that the trial court was powerless to hear the same. It should consider the opinion and directions as applying only to the state of facts existing at the time the appeal was taken and carried up in the record. But the fact that the proffered defense was one necessary to be established and declared good either as to matter of fact or law is here immaterial. Such denial of a hearing upon an undenied defense in such manner would be a denial of a day in court and hence of due process of law.

Klauber vs. San Diego Co. 98 Cal. 105
Warner vs. Godfrey 186 U. S. 365
Reynolds vs. Stockton 140 U. S. 254.
McCoy vs. McCoy 29 W. Va. 795.
Seamster vs. Blackstock 83 Va. 233.

(A synopsis of these cases may be found in this record, (161 and 157-8.)

Assignment (6). Error in State Supreme Court in holding, upon 2nd appeal, that the trial court and plaintiffs in error were bound by the former directions to the trial court.

Warner vs. Godfrey, 186 U. S. 365 Also see points and authorites under Assignment (5).

It is true the State court held that it had formmerly considered and decided the matter in its entirety and that its then directions to the trial court were res judicata as to plaintiffs in error. It is also a fact that the trial court did conform to those directions in all it did subsequent to the remand. But the question is one for final adjudication by this and not by the State court. By law it is made the duty of this court to enforce as well as to construe all the provisions of the federal constitution and to see that the several states, in all their governmental divisions, judicial

Chicago Ry. Co. vs. Chicago 166 U. S. 266.
Scott vs. McNeal 154 U. S. 34.

as well as legislative and executive, keep within the prescribed bounds. A state supreme court can no more escape this supervision by declaring its acts clearly within its lawful powers, than its legislature can by prefixing to an unconstitutional statute, a declaration to the contrary.

Missouri Ry. Co. vs. Elliot 184 U. S. 695.

McCullough vs. Virginia 172 U. S. 102.
Columbia Power Co. vs. Columbia Ry. Co. 172 U. S. 475.

It is also long settled law that the slightest infraction, or infringment of that constitution is as fatal as the greatest. Also that here the law and this court looks at the very substance of the right intended to be protected, and not to the mere forms or methods of action whereby it may be affected.

Chicago Ry. Co. vs. Chicago, 166 U. S. 226
Louisville Ry. Co. vs. Schmidt 177 U. S. 230.
Boyd vs. U. S. 116 U. S. 616, 635.
Gulf Ry. Co. vs Ellis 165 U. S. 150, 154.

While, usually, that is due process of law which is sanctioned by the system of laws in force in the given state, yet an exception to this necessarily exists where by following out that system of laws and that process of law in the given case there must necessarily arise any violation of the fundamental rights secured by the federal constitution.

Guthrie, "The Fourteenth Amendment" 72, citing
Kennard vs Louisiana 92 U. S. 480-481.
Caldwell vs Texas, 137 U. S. 692.
Leeper vs Texas, 139 U. S. 462, 468.

Assignment No. (7). Error in State Supreme Court to hold plaintiffs in error barred by the former decision as the law of the case.

The facts on the second appeal were wholly different from those on the first, and the questions of law presented entirely distinct. By the settled law of this state "the law of the case" had no application.

Kray vs Muggli 84 Minn. 90—94.

While ordinarily the matter of the law of the case doubtless would be one of pure state law involving no federal question, the case is otherwise here since such holding necessarily operated to deprive plaintiffs in error of a "day in court," upon their defense.

Chicago Ry. Co. vs Chicago, 166 U. S. 266.

Assignment (9). Error in State court to hold that its proceedings constituted due process of law and error to hold that thereby plaintiffs in error are are not deprived of their property without due process of law.

That such denial of due process of law, and taking of property without due process of law, though done by a court, or necessarily resulting from the enforcement of its judgment is as much prohibited and invalidated by the constitution as though brought about by direct executive or legislative act has long been settled law.

Chicago Ry. Co. vs. Chicago, 166 U. S. 226.

These holdings by the state court, if untrue in fact and law, go for naught.

This court has held:—

"But a state may not, by any of its agencies, "disregard the prohibitions of the fourteenth "amendment. Its judicial authorities may keep "within the letter of the statute prescribing forms "of procedure for the courts, and give the par- "ties interested the fullest opportunity to be "heard, and yet it might be that its fullest action "would be inconsistent with that amendment. "In determining what is due process of law, re- "gard must be had to substance, not to form. "This court referring to the fourteenth amend- "ment has said: 'Can a state make anything due "process of law, which, by its own legislation it "chooses to declare such? To affirm this is to "hold that the prohibition to the states is of no "avail, or has no application, where the invasion "of private rights is effected under the forms of "state legislation.' Davidson vs. New Orleans, "96 U. S. 97, 102. The same question could be "propounded, and the same answer should be "made in reference to judicial proceedings incon- "sistent with the requirement of due process of "law."

Chicago Ry. Co. vs. Chicago, supra.

It is also settled that these constitutional provisions designed for the security of person and property are to be liberally construed in favor of the pro-

tection designed. Said this court in Boyd vs. U. S., 116 U. S. 616:

"It may be that it is the obnoxious thing in its "mildest and least repulsive form; but illegitimate "and unconstitutional practices get their first "footing in that way, namely by silent ap- "proaches and slight deviations from legal "modes of procedure, This can only be ob- "viated by adhering to the rule that constitu- "tional provisions for the security of liberty and "property should be liberally construed. A "close and literal construction deprives them of "half their efficacy, and leads to gradual de- "preciation of the right, as if it consisted more "in sound than substance. It is the duty of the "courts to be watchful of the constitutional "rights of the citizen, and against any stealthy "encroachments thereon. Their motto should be "*obsta principiis.*"

This was cited and followed in Gulf Ry. Co. vs. Ellis, 165 U. S. 150, wherein a statute imposing an attorney's fee of but ten dollars upon railroad companies where damages were refused payment in prescribed cases was upheld. Nor does it matter that but little is involved.

Sentell vs. Railway Co. 166 U. S. (616) 635.

In Hovey vs. Elliott 167 U. S. 409, this court held that

"While a party who is in contempt is not enti- "tled to be heard as to matters of mere favor,

"yet it is a denial of due process of law to strike "out an answer, and render a decree pro con- "fesso, also that said judgment, rendered for "want of an answer so stricken out, is void "for want of jurisdiction and may be collater- "ally attacked."

In the opinion it is said:

"Looking at the substance, and not at the form, of "the decree in the case of Hovey vs. McDonald, "upon which the rights of plaintiff in error de- "pend, it is plain that the judgment was sub- "stantially one without a hearing, for of what "efficacy or avail was the summons to appear "when the court which issued the summons "rendered its judgment upon the theory that "the ~~judgment~~ was inefficacious. and that the "defendant had no right either to appear or to "be heard in his defense? As said by this court "in Cable Co. vs. Adams, 155 U. S. 689, 15 Sup. "Ct. 268, 360: 'The substance and not the "shadow, determines the validity of the exercise "of the power.' * * * "There is no distinction "in principle between determining a cause upon "issues not raised by the pleadings in the actual "absence of the party, and rendering a decree by "refusing to permit a defendant to be heard in "his defense, and, indeed, by striking the plead- "ing containing such defense from the files."

It is true that the general rule is that this amendment acts specifically upon the state, that any mere error in a State court in applying the law, or in the decision of a case, ex. gr., in misconstruing a

contract and thereby inpairing the real obligation of the contract does not violate its provison nor confer any jurisdiction upon this court. But this rule has no application where, as here, the state court, transgressing its functions, attempts to render a judgment without jurisdiction of the subject matter or without notice to, or opportunity to be heard by the person against whom such judgment operates.

Guthrie Fourteenth Amendment, p, 105, and cases cited above.

Illustrative of the decisions touching matters included in a judgment which was not properly before the court is the very recent case in Nebraska, Richley vs. State, 91 N. W. 867, holding a statue of that state void in so far as it purports to authorize the question of the good faith of a prosecuting witness, in instituting the proceedings, to be determined at the same time that the defendant is tried, and authorizing taxation of costs against him if it be found that he acted maliciously and without probable cause in filing the information, a taking without due process of law.

Assignment No. (II). The defense offered was sufficient in substance to require consideration, and to give this court jurisdiction. Its exclusion calls for a reversal of the judgment.

The rule stated in Swafford vs. Templeton 185 U. S. 487-493, as I think, should apply here, so far as to bring this case within it, if the record shows that the offered defense was in fact refused and a

hearing upon it denied. This rule applies as well to cases brought here by writ of error from a State court as to jurisdiction in the federal circuit courts.

> Life Insurance Society vs. Brown, No. 320, Oct. Term 1902. 23 Sup. Court Rep. (123-124. [Decided Dec. 1st, 1902)

Here the alleged federal question was in no manner in or connected with the original controversy. It could not appear in the original pleadings. It arose during the proceedings in the State courts and is wholly federal in nature. It is the sole basis of jurisdiction here. As the rationale of the rule there established, this court said in the Swafford case, (185 U. S. 487-493).

"But the doctrine referred to had no application "to a case brought in a federal court where the "very subject matter of the controversy is Fed-"eral, however much wanting in merit may be "be the averments which it is claimed constitute "a violation of the Federal right. The distinc-"tion between the cases referred to and the one "at bar is that which must necessarily exist be-"tween controversies concerning rights which "are created by the Constitution or laws of the "United States, and which consequently are in "their essence Federal, and controversies con-"cerning rights not conferred by the Constitution "or laws of the United States, the contention "concerning which may or may not involve a "Federal question depending upon what is the

"real issue to be decided or the substantiality of "the averments as to the existence of the rights "which it is claimed are Federal in character."

In each case the question is solely one of jurisdiction, and in each the basal ground is solely federal in character. As here the violation of the federal right is admitted (or must be so) provided only that the prior denial of a hearing exists. This court held in Penn. Ins. Co. vs. Austin, 168 U. S. 685 and in Andrews vs. Andrews, No. 23, Oct. Term, 1902, 23 S. C. R. 237-239, that the *jurisdiction* of this court is not affected by the fact that the state court may have correctly decided the Federal question. It is also held by this court that upon a writ of error it is competent for this court to examine the facts contained in an agreed statement of facts to ascertain whether the facts support the judgment.

Harrison vs. Perea, 168 U. S. 311.
Kelly vs. Rhoades, No. 93, Oct. Term 1902, 23 S. C. R. 260-261.

This rule must apply here since this record contains a full exemplification of all the facts, testimony and proceedings at the trial. In proof that this record contains everything, see ~~main~~ brief page 4. Hence here the initial subject matter of jurisdiction undeniably exists. This court therefore necessarily has jurisdiction to ascertain, and it is its duty to determine, whether or not the allegations of fact as to there having been a defense offered in the matter which was excluded in the State courts, are true.

Manley vs. Park. No. 120, Oct. Term 1902,
23 Sup. Ct. Rep. 208-9.

But it was the duty of the State courts to have heard and decided that question. In investigating that matter, then, this court is but doing what the State courts should have done. This duty, or exercise of jurisdiction by this court, is wholly different in its origin, nature and effects from a determination as to whether it has jurisdiction—it is the exercise of jurisdiction already vested in this court. Therefore the question of the materiality, or want of substance, in the proffered defenses has no bearing on jurisdiction—it affords no possible support for a motion to dismiss.

Nevertheless, for several reasons I here state those defenses with some of the reasons upon which they rest and certain of the authorities supporting them. From the fact that all evidence offered was excluded on the same ground as the supplemental answer—want of power to consider it, I think this evidence, as well as the supplemental answer, is here to be considered. It is also a fact clearly appearing that this evidence consists in the main, of original records on file in the trial court in a prior action between the same parties and concerning the same land.

The initial facts upon which these defenses were predicated, as thus shown, are:

Plaintiffs in error owned a large tract of improved lands situate in close proximity to the city of Owatonna and of large and increasing value. Upon

this then existed incumbrances to the amount of about $20,000. They needed considerable time in which to effect sales at the advanced price necessary to obtain moneys to repay the advancements of respondent. He very clearly understood all this and from the terms of the contract both parties then intended such necessary time should be allowed; also that the title to all the lands be thereby made and kept in perfect marketable condition. In order that respondent might not be without redress (his debt never due) in case of willful failure, or abandonment by plaintiffs in error, and for interest, the clause providing for a payment of $100 monthly was inserted. It is impossible that the parties intended any forfeiture in fact upon delay or failure to pay one or several of these monthly installments when due. None but a Shylock would so demand and only a fool would consent to such condition. Plainly security only was here intended and that for a considerable time. But practically upon the first failure to pay an installment respondent brings suit in ejectment. In the answer offer to pay all unpaid interest installments is made, but not accepted. He knew this action could not be maintained, but by its means, lis pendens, etc., he could so encumber the title as to prevent consummation of any sales meantime. Upon the inevitable decision that his deed and contract were an equitable mortgage, he moved the court for foreclosure of that mortgage in that action, thus further entangling the lands in litigation. The entire suit being unwarranted, objection to such procedure was made and sustained. Well knowing

all the facts, and that he had no legal right other than such foreclosure, the suit upon the extinct mortgages is brought and their foreclosure with the extra $3,000 insisted upon. He knew he held his debtors wholly in his power—that they retained no means to resent his demands. (His attorneys in this complaint then alleged insolvency, (12 page 7.) Because of these facts they desire to avoid litigation, and at the outset offer him judgment for every penny justly due, with foreclosure, hoping that, with the title thus simplified to be able to sell within the year allowed for redemption, so as to save a little from the wreck.

The first defense is that by so, in bad faith, and with design to sweep the entire property into his strong box, prosecuting this action to final judgment, he is estopped to go back, take up a cause of action he had discarded, and asserted in this action was non existent, and secure as of right the exact relief he previously in open court had spurned. Bad faith, oppressive litigation and exhaustion of his day in court in pursuance of both, and positive renunciation made and of record in court, of both the relief and cause of action, later attempted to be availed of, are the grounds of the alleged defense by estoppel and res judicata. Of these the most was wholly new matter, never before offered in defense, viz., bad faith, designed oppression, ending of his day in court, and the final judgment, determining his asserted causes of action non-existent. In Thompson vs. Howard, 31 Mich. 311, it was held:

"It is well settled that a man may not take

"contradictory positions, and where he has a "right to choose one of two modes of redress, "and the two are so inconsistent that the asser- "tion of one involves the negation or repudiation "of the other, his deliberate and settled choice "of one with knowledge of such facts as would "authorize a resort to each will preclude him from "thereafter going back and electing again."

To like effect see Warner vs. Godfrey, 186 U. S. 365

In 2 Black Judgments, sec. 632, it is said that

"The rule forbids a party to assume succes- "sive positions in the course of a suit or series of "suits in reference to the same fact or series of "facts, which are inconsistent or mutually con- "tradictory."

The rules of the Supreme Court of the State of Minnesota (Nos. XI. and XIV) provide that if either party to an appeal in that court fail to file his briefs at stated times, the court, on motion of his opponent will, without considering the merits, if the failure be by appellant affirm, and if by the appellee, reverse, the judgment or order appealed from. It is settled law there that such judgment of affirmance or reversal, though totally without reference to the merits of law, is res judicata, estoppel by judgment ever after.

Schleuder vs. Corey 30 Minn. 501.
Maxwell vs. Schwartz, 55 Minn. 414.

Also the law of res judicata from splitting a cause of action or omitting a defense, obtains in that

state. It is difficult to perceive any consistency in a law that forever binds a party to an action who by inadvertence neglects to perform a formal act by a given day, or omits to set out in his pleading certain matter he deems unnecessary, yet leaves untrammelled one who intentionally, in bad faith and with design to oppress, renounces his cause of action and remedy to pursue another inconsistent with and destructive of it, such pursuit being continued to final judgment.

As I understand it Warner vs, Godfrey 186 U. S. 365 is in point here But the elements of bad faith and intentional oppression did not exist there. If that trial could be considered as one wherein that plaintiff pleaded all his rights or causes of action, praying for all the relief he was entitled to, then the judgment against him is res judicata on the later demand of foreclosure of the equitable mortgage, since his conduct during the entire trial in renouncing that right and relief excluded it from consideration by the court and constituted a willful exclusion from his case of one ground of recovery—a virtual splitting of his cause of action.

It may be noted, in considering the other defense, election of remedies, that while the plaintiff had but a right to recover his debt and to the avails of whatever liens he had to secure it, yet, in law, he claimed different and inconsistent causes of action and remedies. The doctrine of conclusion by an election of remedies is one of spirit and substance, not one of mere form. It applies wherever a party having or claiming rights giving rise to one or more causes of action, affording either differing remedies,

or a single remedy attainable in different manners or procedure, the several modes of procedure being alternative, by selecting one cause of action or remedy, and following that, whatever the result, is bound by his election, and, though defeated, may not go back and take up an inconsistent cause of action or remedy. The reason for the rule varies with the classes of actions to which it is applicable. In cases where the plaintiff may elect between trover and assumpsit, it is a matter of importance to the defendant to know at the outset which cause of action he must meet—his course in defending will depend on that fact. Hence, in all these and analogous cases, the plaintiff is bound by his election as soon as he brings either action; defendant presumably at once acting, determining his position in defense at the beginning of the suit, the plaintiff is thereby estopped to take the inconsistent position. Here the basis is estoppel and the principle that of estoppel in pais. In the other class of cases both the involved rights and the principle of election is quite different. A plaintiff holds against his debtor an account secured by a chattel mortgage, and a collateral promissory note secured by a real estate mortgage. He may at once maintain actions upon the promissory note and the real estate mortgage, such actions being consistent. Neither the defendant nor the court is prejudiced. But if the several causes of action growing out of a single subject matter or transaction, or the several remedies are alternative so that but one can be taken at a time, then bringing action upon one

does not put the defendant to any change of position; no estoppel arises therefrom to dismiss, and sue upon one of the other causes of action, or, where possible, from amending his pleadings to the same end. But if such plaintiff persist in his first suit to final judgment, losing because of some mischance, or his own act, then he has had his full day in court, has put his adversary to the expense of defending the entire suit, and has completed a proceeding, which unrestricted would soon degenerate into an engine of oppression upon the defendant and and imposition upon the courts—a stigma as well as a blight upon the public administration of justice. Here the basis of the conclusion by election includes public policy; the avoidance of multiplicity of suits, the protection of the defendant from imposition, and the principles underlying the rule against splitting causes of action. Clearly in this case, either with, or independently of, the proffer of judgment, that plaintiff might at any time before submitting the cause for decision, have applied to the court for leave to amend his complaint, or, if that be sufficient to cover both, to change his cause of action and demand judgment therein based upon the equitable mortgage, such motion being addressed to the discretion of the court. Suppose the defendants, though possessing a perfect defense on the merits against the old mortgages, had failed or refused to present it,—they too might petition to be let in to present it at any time before judgment. But after final judgment against them on appeal, it would be too late. Res judicata would confront them. Why should one be

bound and the other free? Many authorities supporting this position are cited or stated in my brief on the second appeal below (record fos. 165 to 177 and 82 to 87.) Many others exist, some of which may be cited in my printed argument herein.

The judgment of the state court is single and rests solely upon its decision upon the federal question.

The usual doctrine of the law of the case exists in its fullness in Minnesota.

Bradley vs. Norris, 67 Minn. 48.
Terryl vs. City of Faribault, 84 Minn. 341.
Clark vs. Richards, 72 Minn. 397.

The former decision held, the law of the case, concluded the court so that it had no jurisdiction after having so decided to determine as to the validity of the defenses offered. It is so expressly stated in the opinion, (183)

"The identical question presented by the pro-
"posed supplemental answer was presented and
"argued to this court on the former appeal, and
"decided adversely to appellants, and is therefore
"*res adjudicata*. That decision became the law
"of the case, and the question cannot be recon-
"sidered on this appeal."

But further: That opinion, as the basis of its obiter remarks concerning the defenses referred to, (183) "The identical question presented by the "proposed supplementary answer was presented and "argued to this court upon the former appeal upon

"that basis only." The gist of the defenses, viz., (1) Bad faith in the prosecution; (2) Oppression of the defendants; (3) That plaintiff had had his full day in court; (4) That not only the wrong remedy was prayed, but the inconsistent causes of action relied upon, and (5) That, in known wrong, the plaintiff had constantly refused to accept full relief, are not only not referred to but necessarily wholly omitted in both the consideratiou given and the reasoning stated in this dictum. Only the matter which was in fact decided on the first appeal is here in any manner considered.

Assignment (10). Denial of the equal protection of the laws.

I think it clearly possible for this clause to be infringed by a state court, through a construction of the laws operating to the advantage of one class and disadvantage of others. Single decisions become precedents, which enlarge by a sort of judicial accretion. Would not a settled practice allowing any creditor holding, or claiming to hold different demands growing out of a single claim or otherwise, but differing as to the amounts legally recoverable thereon, first to prosecute to final judgment that one which promises the largest recovery; then, if that fail to warrant the expected larger recovery, to pro ceed upon another without limit until his list is exhausted, while the debtor is concluded by a single action to determine the sum due, be violative of this provision? The use of capital is ever subject to risk. A lender cannot wholly free himself from this economic rule. Nor may he justly seek to throw all risks pos-

sible including those incident to his own errors, upon his debtor. Yet, by the instant decision this respondent was enabled to accomplish such shift of risk effectively. By his suits he said to plaintiff in error:- "I think I can force you to pay me three thousand "dollars over your contract debt to me. I will com- "pel this by suit to final issue on appeal if need be. "But if I fail in this I will not be the loser. Time "enough then to accept your timely offer of my just "dues. Should you in the meantime presume to re- "sist, I shall force you to pay that sum and all costs." Equality before the law is the object of this Constitutional provision. Is the comparative condition of these parties under the State decision the equality there intended to be guaranteed?

It may be well that a simple citation of Warner vs. Godfrey, 186 U. S. 365 would constitute sufficient authority in this brief, yet possibly the additional matter may not be wholly devoid of aid to the court in its consideration of the case.

In the belief that this judgment of the Supreme Court of the State of Minnesota should be reversed, all the above is respectfully submitted.

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